IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CHARLENE DOI,

Plaintiff,

v.

THE UNIVERSITY OF UTAH, DR. BERNARD MACHEN, DR. DAVID PERSHING, DR. DAVID SPERRY AND DR. DIANA POUNDER,

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 2:03 CV 216 DAK

This matter is before the court on Defendants' Motion for Summary Judgment. A hearing on the motion was held on September 16, 2004. At the hearing, defendants were represented by Chad M. Steur of the Utah Attorney General's Office. Plaintiff, Charlene Doi, was represented by Mary J. Woodhead. The court has carefully considered all pleadings, memoranda, exhibits, and evidence submitted by the parties as well as the law and facts relating to this motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

59

I. INTRODUCTION

This case arises out of a reduction in force action that resulted in the termination of plaintiff's employment at the University of Utah College of Education. Plaintiff's Complaint alleges four causes of action: (1) violation of due process of law in the pretermination proceedings; (2) violation of Utah law and the Utah Constitution; (3) violation of due process of law in the post-termination proceedings; and (4) a state law cause of action for breach of contract based upon the University of Utah's policies and procedures manual. Defendants have moved for summary judgment as to all claims.

II. MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate if the record before the court shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When, as in this case, the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden by pointing to a 'lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Sports Unlimited, Inc. v. Lankford Enter., Inc.*, 275 F.3d 996, 999 (10th Cir. 2002) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)). "[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson*, 477 U.S. at 257. The court will "view the evidence and draw any

inferences therefrom in the light most favorable to the party opposing summary judgment." *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1440 (10th Cir. 1996).

In addition, the qualified immunity doctrine protects the exercise of discretion in an effort to promote the "public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (internal quotation omitted). Qualified immunity allows for reasonable mistakes in judgment. This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued. *Davis v. Scherer*, 468 U.S. 183, 195 (1984). The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 4765 U.S. 335, 341 (1986). Accordingly, qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow*, 457 U.S. at 818.

Under the two-part test for evaluating qualified immunity, the plaintiff must show (1) that the conduct violated a constitutional or statutory right, and (2) that the law governing the conduct was clearly established at the time of the alleged violation. *Meneley v. Shawnee County*, 379 F.3d 949, 954 (10th Cir. 2004); *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Plaintiff is not required to show that the very conduct in question has previously been held unlawful. *Id.* She is, however, required to demonstrate that the

unlawfulness was "apparent" in light of established law. *Id.* Unless both prongs are satisfied, the defendant will not be required to "engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

B. Background

Plaintiff lost her job when the position she held as the Assistant Dean of the College of Education was eliminated. Defendants claim that the reduction in force was necessitated by a restructuring of the College of Education, budgetary constraints, and lack of sufficient work to justify plaintiff's position. Plaintiff alleges that the reduction in force was a sham because she was the only employee terminated, her position was never really abolished because it continues to receive funding in the budget, and her job responsibilities have just been transferred to other employees with different job titles.

Plaintiff began working for the University of Utah as an academic advisor in 1975. In 1994, plaintiff was hired to the position of Assistant Dean in the Graduate School of Education (currently known as the College of Education). In 1999, Dr. David Sperry was hired to be the new Dean of the College of Education. Dr. Sperry began a major reorganization of the college that eventually resulted in the two employees that were supervised by plaintiff voluntarily leaving. About this time, plaintiff began expressing dissatisfaction with her job. Salary funds for the two positions plaintiff supervised were transferred to a different department and plaintiff's duties and responsibilities began to change even though she kept her title and salary. It is undisputed that the original restructuring proposal did not call for the elimination of plaintiff's job. Defendants claim that as time went on, there was not sufficient work to justify plaintiff's position and that money was needed to comply with a new

unfunded mandate of the National Council for the Accreditation of Teacher Education ("NCATE"). In contrast, plaintiff claims she was very busy and the "reduction in force" was just a way to get rid of her without needing to demonstrate cause.

Plaintiff claims that she was not afforded an adequate pretermination hearing. It is undisputed that on April 27, 2001, the plaintiff met with Dr. Sperry and Dr. Diana Pounder (an associate dean in the College of Education) and was informed that due to a reduction in force her position would be terminated effective June 30, 2001. During that meeting, plaintiff was presented with a letter dated April 18, 2001 that explained the reasons why her position was being terminated. Plaintiff signed the letter to acknowledge she had read it and understood its contents. The only factual dispute regarding the meeting is plaintiff's contention that the news of the reduction in force came as a total shock to her. Defendants argue plaintiff had advance notice that her position would likely be eliminated. Defendants point to the fact that plaintiff had been searching for a new job prior to being officially informed of the reduction in force as proof plaintiff was on notice of her potential termination. On a summary judgment motion, the court must view all evidence in a light most favorable to the nonmoving party, therefore, the court will assume that the first time plaintiff had any indication that her position would be terminated was when she met with Dr. Sperry and Dr. Pounder on April 27, 2001.

Plaintiff filed a grievance with the Department of Human Resources to contest the reduction in force and filed a discrimination complaint with the Office of Equal Employment. Plaintiff later withdrew her discrimination complaint and has not alleged discrimination as part of this lawsuit. After several attempts at filing a formal grievance, plaintiff was granted a hearing before the Staff

Grievance Committee on November 8, 2001--several months after her termination became effective. Plaintiff was assisted by counsel at the hearing and the committee heard testimony from Dr. Pounder, Dr. Sperry, and plaintiff. The Committee issued a written recommendation dated November 15, 2001 summarizing the evidence that was presented at the hearing and recommending that the reduction in force be upheld. Pursuant to University policy, the committee's recommendation was reviewed by Vice President David Pershing, who followed the committee's recommendation to uphold the reduction in force. Plaintiff then appealed the decision to University of Utah President Bernard Machen, who also affirmed the Committee's determination.

Plaintiff alleges several improprieties in the post-termination grievance process. First, she claims she was discouraged from filing a grievance and was not awarded a formal hearing until well after her termination had already taken effect. Second, plaintiff claims that defendants Dr. Pounder and Dr. Sperry provided falsified documents at the hearing regarding the College of Education's budget. Third, plaintiff asserts that her due process rights were violated because she was not allowed to have a separate hearing before either Vice President Pershing or President Machen before they decided to uphold the committee's recommendation. Plaintiff claims that in the absence of a hearing, the complete tape recordings of the formal hearing should have been provided to and reviewed by Vice President Pershing and President Machen prior to them making their decisions.

One of the heavily debated issues in this case is the use of "open line" budgets. It is undisputed that from plaintiff's termination to the present, the College of Education has continued to request and receive funds for the position formerly held by plaintiff. The budget lists the position in its request for funding but has an open line next to it instead of the name of an

employee–indicating that the position is not currently filled. Defendants claim this is a common practice because appropriations are more likely to be made for personnel lines than non-personnel lines. In other words, the department requests money for a position that does not exist and for which it has no intention of filling. Upon receiving the funds for that position, the department then uses the funds for other purposes. Defendants characterizes the practice of using open line budgets as "common" while plaintiff calls it "fraud."

C. Discussion

1. *Eleventh Amendment Immunity*

Defendants claim that they are entitled to Eleventh Amendment immunity. Since the issue of Eleventh Amendment immunity bears directly upon whether this court has subject matter jurisdiction, it must be addressed before discussing the merits of the case. *See Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). "With certain limited exceptions, the Eleventh Amendment prohibits a citizen from filing suit against a state in federal court." *Id.* There are two circumstances where a citizen may sue a State in federal court without violating the Eleventh Amendment. The first exception is where the State has expressly waived its Eleventh Amendment immunity. "The test for determining whether a State has waived its Eleventh Amendment immunity 'from federal court jurisdiction is a stringent one' and in 'the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction," we will not find that a State has waived its constitutional immunity." *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1195 (10th Cir.1999)(quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). The second exception is where Congress has abrogated a State's Eleventh Amendment immunity through a valid

exercise of Congressional power. *Id.* However, it is well-established that Congress did not abrogate Eleventh Amendment immunity by passing 42 U.S.C. Sections 1981, 1982, and 1983. *See Quern v. Jordan*, 440 U.S. 332, 341 (1979). Therefore, Eleventh Amendment immunity clearly applies in this case.

The Eleventh Amendment immunity analysis is made more difficult in this case due to the lack of clarity in plaintiff's Complaint. The Complaint does not indicate whether the defendants are being sued individually, in their official capacities, or both. "Official capacity suits represent another way of pleading an action against an entity of which an officer is an agent." *Arnold v. McClain*, 926 F.2d 963, 966 (10th Cir. 1991) (internal quotations and citations omitted). In fact, only two summons were returned to the court and they were both directed to the University of Utah. In addition, only the University of Utah has filed an answer. Of course, plaintiff need not serve the individual defendants if they voluntarily make an appearance in the case through counsel. While no answer has been filed on behalf of the individual defendants, the Utah Attorney General's Office has appeared on behalf of all the defendants and the motion for summary judgment purports to be on behalf of the "University of Utah, Dr. Bernard Machen, Dr. David Pershing, Dr. David Sperry, and Dr. Diana Pounder." Moreover, defendants seek summary judgment, in part, based upon the doctrine of qualified immunity. Qualified immunity is inapplicable to suits brought against government employees in their official capacities. *See Meiners v. University of Kansas*, 359 F.3d 1222, 1233 n.3 (10th Cir. 2004) ("Qualified immunity applies to claims for monetary relief against officials in their individual capacities, but it is not a defense against claims for injunctive relief against officials in their official capacities."). Although it may not be warranted by the language of plaintiff's

Complaint, the court will afford plaintiff the most liberal interpretation of her Complaint possible and view it as pleading causes of action against the defendants in both their individual and official capacities.

The Eleventh Amendment bars the claims by plaintiff made directly against the University of Utah from being brought in this court. Plaintiff does not dispute that the University of Utah is an arm of the state entitled to Eleventh Amendment immunity but argues that her state law contract and constitutional claims survive Eleventh Amendment immunity because she is only requesting reinstatement, and not damages, for her state law claims. Plaintiff confuses whether a federal court can look to contractual rights and state law as a basis for finding a protected property interest that gives rise to minimal federal due process protections with whether a citizen can sue a State in federal court for violations of state law. Defendants concede that state law affords plaintiff a property interest in her continued employment sufficient to give rise to minimal procedural due process protections. The problem is that plaintiff has done much more than simply point to state law or contractual rights as the basis of her property interest, she has brought separate causes of actions against an arm of the state in federal court for violations of state law.

Likewise, plaintiff's claims for back pay, monetary damages, and retrospective declaratory relief against the other defendants in their official capacities are also barred by the Eleventh Amendment. "However . . . the Eleventh Amendment does not prohibit a suit in federal court to enjoin prospectively a state official from violating federal law. Reinstatement of employment is a form of prospective equitable relief that is" not barred by the Eleventh Amendment. *Meiners v. Kansas*, 359 F.3d 1222, 1232 (10th Cir. 2004). In other words, plaintiff's claims brought directly

against the University of Utah are barred by the Eleventh Amendment. However, the Eleventh Amendment does not prohibit plaintiff from seeking reinstatement of employment against the individual defendants sued in their official capacities nor does it prohibit plaintiff from seeking monetary damages under § 1983 against the defendants in their individual capacities. In sum, plaintiff's causes of action naming the University of Utah as a defendant are dismissed and she is prohibited by the Eleventh Amendment from seeking anything other than reinstatement with respect to her causes of action against the individual defendants in their official capacities.

2. *Pretermination Proceedings*

The parties do not dispute that plaintiff was entitled to some form of a pretermination hearing, even though it was just a reduction in force as opposed to a firing for cause. *See West v. Grand County*, 967 F.2d 362, 367-68 (10th Cir. 1992) (holding that the plaintiff was entitled to a pretermination hearing because "the asserted reduction in force was directed specifically just at [plaintiff] . . . [s]uch a termination is potentially stigmatizing and a pretermination hearing would provide an important opportunity for her to argue her claim that the reduction in force was a sham."). However, the parties disagree as to whether plaintiff's pretermination proceedings meet minimum constitutional standards.

"The pretermination hearing is merely the employee's chance to clarify the most basic misunderstandings or convince the employer that termination is unwarranted." *Powell v. Mikulecky*, 891 F.2d 1454, 1458 (10th Cir. 1989). The court must judge the pretermination hearing in light of the totality of the circumstances. "The procedural requisites and formality of pre-termination procedures vary depending upon the importance of the interests involved and the nature of post-

termination proceedings . . . the adequacy of pre-termination procedures must be examined in light of available post-termination procedures." *Langley v. Adams County, Colorado*, 987 F.2d 1473 (10th Cir. 1993). In the instant case, plaintiff participated in formal post-termination procedures, thereby reducing the applicable standards for the pretermination hearing. "A brief face-to-face meeting with a supervisor provides sufficient notice and opportunity to respond to satisfy the pretermination due process requirements." *West*, 967 F.2d at 368.

The cases cited by plaintiff in support of her argument that she did not receive adequate pretermination due process are clearly distinguishable from the facts of this case. *See Montgomery v. City of Ardmore*, 365 F.3d 926 (10th Cir. 2004); *Lovinger v. City of Black Hawk*, 1999 WL 1029125 (10th Cir. November 12, 1999) (unpublished decision). In *Montgomery*, the plaintiff was on extended medical leave when he contacted his supervisor by phone to inquire about returning to work. 365 F.3d at 932. The plaintiff was informed during the phone call that his employment had already been terminated, that "they're not going to let you come back," and that he "was not going to be able to return to work." *Id.* at 936. The plaintiff in *Montgomery* was never notified of his termination until over a month after it had already become effective. *Id.* In *Lovinger*, the plaintiff's termination was effective "at the very moment he was given notice of the charges against him." 1999 WL 1029125 at *3. The Tenth Circuit noted that the *Lovinger* case "is clearly unlike those cases in which an employee is given the duration of a meeting, or even several days, to respond to charges before she is terminated." *Id.*

In the instant case, it is undisputed that plaintiff met with her two direct supervisors on April 27th and was provided with a letter detailing when and why she was being terminated more than two

months prior to when the termination became effective. Plaintiff argues that she never received a true pretermination hearing because when she was informed of the reduction of force, the decision to terminate her position had already been made. Plaintiff also argues that she should have been allowed a formal hearing prior to the effective date of her termination rather than having a formal hearing several months after her termination.

The case law previously cited makes clear that plaintiff was not entitled to a formal hearing during the pretermination process. Moreover, the court does not interpret the case law cited by plaintiff as requiring a pretermination hearing prior to a decision being made by defendants to terminate her position. Rather, plaintiff is entitled to notice of her termination, an explanation as to why she is being terminated, and an opportunity to respond prior to the termination becoming effective. Plaintiff's employment with the University was terminated on June 30, 2001. She received written notification of the reduction in force more than two months prior to when it became effective. The court finds that defendants' pretermination conduct and procedures satisfy due process requirements. Even if plaintiff could establish that due process requires she be given notice prior to her employer making a decision to implement a reduction in force, she cannot demonstrate it was clearly established law at the time of the alleged violation. Accordingly, the defendants sued in their individual capacities are entitled to qualified immunity with respect to plaintiff's claim that her due process rights were violated in the pretermination proceedings. Thus, plaintiff's cause of action for violation of due process of law in the pretermination proceedings is dismissed.

3. *Post-Termination Proceedings*

"When the pretermination process offers little or no opportunity for the employee to present his side of the case, the procedures in the post-termination hearing become much more important." *Benavidez v. Albuquerque*, 101 F.3d 620, 626 (10th Cir. 1996). Plaintiff admits that "[t]he University of Utah provided Ms. Doi with a full-fledged evidentiary hearing in which she had a right to present her case," but claims that since the evidence and testimony she presented at the hearing were not made available to Vice President Pershing and President Machen on appeal, her procedural due process rights were violated. (Pl.'s Mem. in Opp'n at 22.) Specifically, plaintiff points to the fact that Pershing and Machen were not provided audio tapes of the hearing when deciding the appeals and therefore could not know plaintiff's position. Additionally, plaintiff claims that defendants failed to follow some of their own internal procedures when handling her appeal (e.g., providing Pershing and Machen a complete copy of the record and notifying plaintiff that the matter was now before Pershing, etc.).

It is well-established "that a university's failure to follow its established guidelines in overseeing a grievance 'does not in and of itself implicate constitutional due process concerns.'" *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 522 (10th Cir. 1998) (quoting *Purisch v. Tennessee Technological University*, 76 F.3d 1414, 1423 (6th Cir. 1996)). In order for plaintiff to prevail in federal court, she must establish a deprivation of a federal constitutional right. The Fourteenth Amendment dictates what minimum due process requirements must be met, not a university's policies or rules. Unfortunately for plaintiff, "[t]he Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions." *Id.* at 530 (citation omitted).

The court agrees with defendants that there is no procedural due process right to have audio tapes of the formal hearing provided to Pershing and Machen when they decide whether to affirm the committee's decision. *See Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976) (concluding that a university's failure to transmit tapes or transcripts of a proceeding held before a grievance committee to the board responsible for affirming or rejecting the committee's report and recommendation did not violate constitutional due process rights). In addition, Fourteenth Amendment due process does not require the formal grievance hearing be held in the presence of President Machen, even if he had final authority over whether plaintiff was discharged. It may be true that President Machen could be found liable if he upheld a grievance process that he knew did not afford a participant due process, but that is not the case here. The written report and recommendation of the grievance committee provided to President Machen that summarized the evidence and arguments made at the hearing is a sufficient basis for President Machen to conclude that plaintiff was afforded minimal procedural due process. Plaintiff was afforded an opportunity to present evidence and contest the reasons for her termination. Procedural due process does not require that defendants make the right decision, nor does it allow the court to substitute its judgment for that of the grievance committee.

The court finds that under the totality of the circumstances, plaintiff has not produced evidence sufficient to create a factual dispute that would prevent summary judgment as to plaintiff's claim for violations of procedural due process in her post-termination proceedings. Consequently, plaintiff's cause of action for violations of procedural due process in the post-termination proceedings is dismissed.

4. *Substantive Due Process*

Plaintiff claims that her substantive due process rights were violated by the use of allegedly falsified budget documents at the hearing. Plaintiff alleges that defendants Sperry and Pounder submitted budget documents at the hearing that showed no allocation of money for her position but that the actual budgets submitted to the legislature contain "open line" entries for her position. For plaintiff to prevail on a substantive due process claim, she "must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power, she "must demonstrate a degree of outrageousness and magnitude of potential or actual harm that is truly conscience shocking." *Tonkovich*, 159 F.3d at 528 (internal quotations and citations omitted).

Assuming plaintiff can establish a substantive due process right in her continued employment, the court finds that under the totality of the circumstances, plaintiff has not produced evidence sufficient to create a factual dispute that would prevent summary judgment as to the substantive due process claim. The defendants' use of open line budgets before the legislature may raise ethical concerns, but the propriety of such budgetary practices is a matter best addressed by the legislature, not this court. The use of open line budgets does not change the fact that the position plaintiff held at the College of Education no longer exists in reality. Since plaintiff was terminated in 2001, no one has been employed in the position she held at the College of Education. The fact that some of plaintiff's job responsibilities have been given to other employees is a normal occurrence following a reduction in force and does not invalidate defendants' claim that plaintiff's position was eliminated "due to budgetary constraints and the lack of sufficient work to justify a

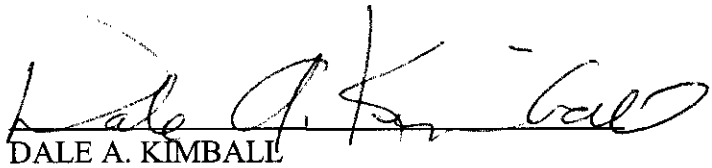
full-time position." Accordingly, plaintiff's cause of action for substantive due process violations is dismissed.

III. CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is GRANTED. This case is dismissed with prejudice in its entirety, each party to bear its own costs. The Clerk of the Court is directed to enter judgment accordingly.

DATED this 28th day of October, 2004.

BY THE COURT:



DALE A. KIMBALL
United States District Judge

blk

United States District Court
for the
District of Utah
October 29, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00216

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Chad M. Steur, Esq.
UTAH ATTORNEY GENERAL'S OFFICE
LITIGATION UNIT
160 E 300 S 6TH FL
PO BOX 140856
SALT LAKE CITY, UT 84114-0856
EMAIL

Mary J. Woodhead, Esq.
261 E 300 S STE 300
SALT LAKE CITY, UT 84111
EMAIL